(9)

No. 97-147

In the
Supreme Court of the United States
October Term, 1997

ATLANTIC MUTUAL INSURANCE CO. AND INCLUDIBLE SUBSIDIARIES,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Petitioner's position in this case is straightforward: The term "reserve strengthening" in section 1023(e)(3)(B) of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986), (the "1986 Act") should be interpreted in accordance with its established tax law definition and consistent with its undisputed meaning in comparable 1984 legislation. The legerdemain throughout respondent's brief does not provide a basis for rejecting that straightforward statutory interpretation.

ARGUMENT

1. *Respondent's fallacious premise.* The fundamental premise in respondent's brief is his position that the Conference Committee in 1986 expressly "rejected" the definition of "reserve strengthening" espoused by petitioner.

(R. Br. at 8, 13, 22, 23, 24, 31, 32, 33 and 34.)[1] In this regard, respondent points to a sentence in the "reserve strengthening" provision of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 216(b)(3)(A), 98 Stat. 494, 758 (1984), (the "1984 Act") (and in the Senate version of the "reserve strengthening" provision of the 1986 Act) that was omitted in the final version of the 1986 Act and argues that the omission of that sentence demonstrates that Congress expressly "rejected" in the final version of the 1986 Act the established tax definition of the term "reserve strengthening." (*See, e.g.*, R. Br. at 32.)

Petitioner's opening brief explains the meaning of the omitted sentence and why the inclusion or exclusion of that sentence could not have changed the general definition of "reserve strengthening" in the statutes in question. (P. Br. at 38-42.) As explained in petitioner's opening brief, (P. Br. at 40), Congress clearly designated the sentence in question in the 1984 Act as a special rule related to *newly issued* contracts. Both the caption in the Senate version of the bill and the use of the term "issued" in the sentence establish that the sentence applied only to contracts issued in 1983.[2] Thus, even if respondent were correct in asserting that the term "reserve strengthening" did not have an established meaning in insurance tax precedents (which he is not, as explained in petitioner's opening brief at 15-20 and *infra* pp. 5-9), the

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[1] Respondent's brief on the merits filed in this case is cited herein as R. Br. at ____. Petitioner's opening brief filed in this case is cited herein as P. Br. at ____. The Joint Appendix filed with petitioner's opening brief is cited herein as Jt. App. at ____. The Stipulations of Fact filed with the Tax Court are cited herein as Stip. ¶ ___.

[2] Respondent conveniently edits out the word "issued" when quoting the sentence in question in the text of his brief. (R. Br. at 31.) *See* 1984 Act § 216(b)(3)(A).

sentence regarding reserving practices could not have provided any definition for the term, because Congress clearly included that sentence as a limited exception to the "reserve strengthening" provision with respect to certain reserves for newly issued contracts.[3]

Apart from his misinterpretation of the special rule in the deleted sentence, respondent attempts to support his argument that the Conference Committee specifically "rejected" the definition of "reserve strengthening" espoused by petitioner by misstating the contents of the Conference Report, H.R. Rep. No. 99-841 (1986) *reprinted in* 1986 U.S.C.C.A.N. 4075. (R. Br. at 22-23.) Respondent's brief states that "the *Conference Committee emphasized that* '[t]he *conference agreement modifies* the Senate amendment with respect to the treatment of reserve strengthening' *and provides* a more expansive definition of that term than the Senate Finance Committee had provided." (R. Br. at 23

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[3] Respondent suggests that petitioner's interpretation of the term "reserve strengthening" in the 1984 Act would eliminate any need for an explicit exception with respect to reserves for certain contracts issued in 1983. (R. Br. at 33 n.22.) Respondent's vague suggestion does not withstand analysis. Respondent assumes incorrectly that the tax definition of "reserve strengthening" is not ordinarily applicable to newly issued contracts. As evidenced in the House and Senate Reports for the 1984 Act, the term "reserve strengthening" applied to reserves on new contracts that were based on new assumptions or methodologies in the absence of a specific rule to the contrary. H.R. Rep. No. 98-432, at II-1440 (1984) *reprinted in* 1984 U.S.C.C.A.N. 697, 1085; S. Rep. No. 98-169, at I-568 (1984); *see also* I.R.C. § 807(f)(1) (1986) (specifically limiting the "reserve strengthening" rule in that provision to "contracts issued before the taxable year").

(emphasis added).)[4] It is true, as discussed in petitioner's opening brief, (P. Br. at 43), that the Conference Report states that the conference agreement *modified* the *treatment* of "reserve strengthening." H.R. Rep. No. 99-841, at II-367. However, *nowhere* in the Conference Report (or anywhere else) did the Conference Committee state, as asserted in respondent's brief, that the conference agreement "provides a more expansive definition" of the term "reserve strengthening," and respondent's assertion is flatly wrong.[5]

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[4] Respondent proceeds to conjure up a theory that Congress expanded the definition to address widespread tax-motivated manipulation of loss reserves in property and casualty insurance. (R. Br. at 23-24.) In this regard, respondent refers to several sources that are not in the record in this case to support the assertion that loss reserves are easily manipulated and that such manipulation could have occurred in 1986 for tax-motivated reasons. (R. Br. at 12, 25-26.) None of those sources, however, suggest that such manipulation occurs as the result of normal reserving practices rather than changes in assumptions or methodologies. Moreover, the conclusions in two of the "sources" (one of which was a "working paper") indicate that the data does not necessarily support the irrelevant (to this case) theories espoused therein (in one case the far-fetched theory that the tax law was the cause of the liability insurance crisis of the 1980s). Of course none of respondent's inappropriate references under any circumstances addresses the core question that respondent avoids: If Congress meant to capture all increases, why didn't it just say so?

[5] Respondent also points to language in the Tax Court's opinion in this case in support of the argument that the Conference Committee expanded the definition of the term "reserve strengthening." (R. Br. at 5, 22.) In *Western National Mutual Ins. Co. v. Commissioner*, 102 T.C. 338 (1994), *aff'd*, 63 F.3d 90 (8th Cir. 1995), the reviewed Tax Court opinion, the court did *not* conclude that the Conference Report expanded the definition of "reserve strengthening." Instead, the majority of the Tax Court determined that the legislative history of the 1986 Act was contradictory and could not override the intent of Congress as expressed in the plain language of the statute. *Id.* at 360.

2. *The established tax definition of "reserve strengthening."* Despite having previously acknowledged that "reserve strengthening" had a clear meaning when applied to life insurance companies and to life reserves, *Atlantic Mutual Ins. Co. v. Commissioner*, 71 T.C.M. (CCH) 2154, 2159 (1996), *rev'd*, 111 F.3d 1056 (3d Cir. 1997); *Western National Mutual Ins. Co. v. Commissioner*, 102 T.C. 338, 353 (1994), *aff'd*, 63 F.3d 90 (8th Cir. 1995), respondent now argues that the precedents do not support a conclusion that there is a single definition of the term "reserve strengthening" even in the life insurance context. (R. Br. at 27.) Respondent's newfound contention that the term "reserve strengthening" has not been used in insurance tax law to mean only those additions to reserves that involve changes in assumptions or methodologies, (R. Br. at 26-31), is unsupportable in the face of all of the authorities to the contrary. (*See* P. Br. at 15-19.) It merits a reply primarily to show the lengths to which respondent has gone to engineer a response to one of the key points in petitioner's brief.

Respondent states that the regulation under section 810 of the Internal Revenue Code of 1954 uses the term "reserve strengthening" only in a caption and that the "term was not thereafter defined or even mentioned in the text of that regulation." (R. Br. at 27.) For this purpose, respondent conveniently ignores the use of the term in the examples that are included in the regulations under section 810 (as well as in the regulations under section 809 and in examples in the regulations under section 806). Treas. Reg. §§ 1.806-4(b) *Example 1* (1961); 1.809-5(a)(5)(iii) (1961); 1.810-3(b) *Example 2* (1961); 1.810-3(f) *Examples 2 and 3* (1961).

Respondent then resorts to, among other things, the artful use of an incomplete quotation from an example in the Treasury regulations in order to manufacture authority for his

untenable position that "reserve strengthening" is not limited to increases in reserves involving changes in assumptions or methodologies. Respondent states that "[t]he regulation issued provides an example of how that statute applied in the context of 'reserve strengthening *attributable to the change in basis*' (26 C.F.R. 1.810-3(b), Ex. 2) (emphasis added)." (R. Br. at 27 n.16.) With his selective quotation of the regulations, respondent implies that the regulations fairly could be read to mean that "reserve strengthening" under section 810(d) can be attributable to things other than a change in basis. Indeed, respondent goes on to state: "A change in reserves that results from a change in 'the basis' of setting reserves, is, of course, only one type of 'reserve strengthening.'" (R. Br. at 27.)

The portion of the regulations respondent partially quotes actually states as follows:

> Under the provisions of section 810(d)(1), as a result of the *reserve strengthening attributable to the change in basis which occurred in 1959*, L would include $5 (computed in the manner described in example (1)) as a net increase under section 809(d)(2) and paragraph (a)(2) of § 1.809-5 in determining its gain or loss from operations for 1960.

Treas. Reg. § 1.810-3(b) *Example 2* (1961). The complete regulatory language on which respondent focuses thus simply is trying to show that one tenth of L's 1959 reserve increase caused by a change in basis which occurred in 1959 ($50 per example (1)) must be taken into account in determining gain or loss from operations in 1960. It nowhere suggests that

"reserve strengthening" may be attributable to something other than a change in basis in computing reserves.

Respondent later states in this section of his brief that:

> [u]nlike the statute involved in the present case, the narrow focus of Section 810(d)(1) in the Life Insurance Company Tax Act of 1959 was only on changes in "the basis" of accounting for reserves. That statute, by its terms, did not purport to apply broadly to all "reserve strengthening" actions and the concept of "reserve strengthening" does not even appear in the statutory text.

(R. Br. at 28.) In so stating, respondent apparently ignores one of his own recent rulings in which he states that:

> [i]n the legislative history of the 1959 Act, the term "basis" is used interchangeably with "method" when describing the effects of a change in basis of computing reserves.

Rev. Rul. 94-74, 1994-2 C.B. 157. The legislative history to which the ruling refers expressly ties changes in method to "reserve strengthening":

> **(d) Adjustment for change in computing reserves.**--Subsection (d) of section 810, which is identical with the House bill, deals with the effect on deductions for increases in reserves (or amounts included in income for decreases in reserves) where there have been changes in the method of computing the

> reserves. Paragraph (1) refers to what is generally described as reserve strengthening. This paragraph provides in the case of reserve strengthening that the additional deduction which would otherwise be allowable because of additions to reserves occurring in this strengthening process is to be taken into account ratably over a 10-year period rather than in a single year.

S. Rep. No. 86-291 (1959) *reprinted in* 1959 U.S.C.C.A.N. 1575, 1632-33. It simply is disingenuous at this stage for respondent to change his story about the meaning of the term "reserve strengthening" in the case of life insurance. *See Western National*, 102 T.C. at 352 ("Respondent acknowledges that the term 'reserve strengthening' has a commonly understood industry meaning in the life insurance area . . ."); *Id.* at 353 ("Respondent agrees that the use of reserve strengthening in connection with [the 1984 Act] was in accord with life insurance industry usage . . ."); *Atlantic Mutual*, 71 T.C.M. at 2159 ("Respondent acknowledges that, in the life insurance industry, the term 'reserve strengthening' has the meaning petitioner ascribes to it.").

Also to be noted are respondent's nimble changes in his frame of reference. (R. Br. at 26-31.) He flitters from insurance tax precedents to insurance industry precedents to life insurance precedents to property and casualty insurance precedents in an effort to confuse the clear meaning of the term "reserve strengthening" in the insurance tax law. Respondent simply has no direct response to the income tax precedents cited in petitioner's brief which clearly establish that "reserve strengthening" means "additions required when a method or assumption used in calculating policy reserves is changed so as to produce a higher reserve." *Jefferson*

Standard Life Ins. Co. v. United States, 272 F. Supp. 97, 121 (M.D.N.C. 1967), *aff'd in part, rev'd in part, and remanded*, 408 F.2d 842 (4th Cir. 1969).

That there has long been an established tax law definition of the term "reserve strengthening" is reinforced by the fact that Congress did not feel any need to provide a definition for the term. The House version of the 1984 Act contained a "reserve strengthening" provision with no attempt to define the term "reserve strengthening" for any purpose. The Senate version of the 1984 Act added the sentence discussed *supra* pp. 1-4 regarding reserve practices, but that sentence was intended to provide a special exception to the "reserve strengthening" provision that applied only to reserves for certain contracts issued in 1983. Neither the Senate version nor the final version of the 1984 Act included a general definition of the term "reserve strengthening." Nor did Congress direct respondent to issue regulations to provide such a definition, and, in fact, respondent never promulgated any such regulations. Thus, it seems apparent that all those involved in drafting and implementing the "reserve strengthening" provision in the 1984 Act had a clear understanding of the insurance tax meaning of the term.

In sum, as explained in petitioner's opening brief, (P. Br. at 15-19), there is an established tax law definition of the term "reserve strengthening." That definition surely was what a careful Congress would have had in mind in using the term in the 1986 Act. In fact, there is no tax authority whatever for respondent's sweeping regulatory definition of "reserve strengthening."

3. *The expert testimony.* Respondent falsely asserts that petitioner's position and the Tax Court's holding are based on industry practice that provides the definition for the

term "reserve strengthening" in section 1023(e)(3)(B) of the 1986 Act. (R. Br. at 4, 18.) Petitioner, the Tax Court, and the Eighth Circuit all base their conclusion regarding the meaning of the term "reserve strengthening" on the established *tax law* definition of the term. Petitioner observed in its brief that all of the experts accepted the established tax law definition as a valid interpretation of the term "reserve strengthening" in property and casualty insurance. Petitioner referred to the experts merely to show that the term "reserve strengthening" is used in property and casualty insurance to mean an increase in loss reserves involving a change in assumptions or methodologies. (P. Br. at 27-28.)

In discussing the Tax Court's analysis in *Western National*, respondent states that "[t]he majority relied on the taxpayer's expert witnesses in concluding that the term 'reserve strengthening' has an 'industry meaning' that is narrower than the definition contained in the agency's regulation." (R. Br. at 4.) However, the expert testimony in *Western National* was not central to the Tax Court's analysis in that case. In fact, the Tax Court's only reference to the expert testimony in its opinion in *Western National* is in a single footnote. 102 T.C. at 351 n.10. The Tax Court's analysis in *Western National* instead was centered on the established definition of "reserve strengthening" in insurance tax precedents and on Congress' stated objective to prevent "artificial" reserve increases. *Id.* at 351-54, 356. Thus, respondent's effort to shift the focus of this case (presumably because he finds comfort in the absence of a universally-

recognized single industry meaning) contributes nothing to the inquiry.[6]

4. *Loss reserves and life reserves.* Respondent, like the Third Circuit, attempts to draw a distinction between the taxation of life insurance companies and of property and casualty insurance companies, as well as between loss reserves and life reserves.[7] The dichotomy respondent attempts to create simply does not exist, as explained at

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[6] Respondent attempts to blunt the impact of the expert testimony that is favorable to petitioner by suggesting that *both* "government witnesses stated that the definition proposed by petitioner's expert 'is a restricted definition and is not the most commonly understood definition' of reserve strengthening (J.A. 191)." (R. Br. at 19 n.8.) However, as is evidenced by respondent's single citation to the Joint Appendix, only one of respondent's experts, Raymond Nichols, said that petitioner's definition of "reserve strengthening" was restricted; respondent's other expert, Ruth Salzmann, reached no such conclusion. (Jt. App. at 165-81, 201-13.)

[7] In attempting to create a dichotomy between the taxation of life insurance companies and of property and casualty insurance companies, respondent selectively quotes *Alinco Life Ins. Co. v. United States*, 373 F.2d 336, 352 (Ct. Cl. 1967), as follows: "tax provisions relating 'primarily to casualty-type insurance * * * are rather meaningless in pure life insurance[.]'" (R. Br. at 30.) That quoted material in fact relates only to unearned premiums and unearned premium reserves of casualty insurance companies. A fair quote would read as follows:

> The testimony of Alinco's expert actuary, Arthur C. Eddy, is entirely persuasive that these technical terms [*i.e.*, unearned premiums and unearned premium reserves] refer primarily to casualty-type insurance and are rather meaningless in pure life insurance.

Alinco, 373 F.2d at 352. Clearly, the court in that case did not suggest that all terms used in property and casualty insurance are meaningless in life insurance or that all terms used in life insurance are meaningless in property and casualty insurance.

length in petitioner's opening brief. (P. Br. at 34-38.) There is no difference between the two types of reserves or the taxation of the two types of companies that is relevant to this case. (P. Br. at 34-38.) Significantly, respondent ignores the fact that section 846 of the Internal Revenue Code of 1986, to which the "reserve strengthening" provision in the 1986 Act relates, applies *both* to life insurance companies and to property and casualty insurance companies. In this connection, respondent never even acknowledges that, at the time the 1986 Act became law, a company taxed as a life insurance company that changed its method of computing loss reserves from an undiscounted basis to a discounted basis already was subject to the "reserve strengthening" provisions of section 807(f) (previously section 810(d)) and that his interpretation of section 1023(e)(3)(B) of the 1986 Act would subject a life insurance company's changes in loss reserves to two different interpretations of the term "reserve strengthening." (P. Br. at 21 n.9, 30.)

5. *The legislative history.* Respondent argues that the "reserve strengthening" regulation "faithfully adheres" to the intent of the Conference Committee as expressed in the Conference Report and, therefore, should be upheld. (R. Br. at 8.) As a preliminary matter, we note that respondent's regulation does not adhere even to its own interpretation of the Conference Report. (P. Br. at 48.) In any event, as the Tax Court noted in *Western National*, the Conference Report is subject to a different interpretation.[8] 102 T.C. at 350,

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[8] The Conference Report does not state, as respondent asserts, that "all additions to reserves for pre-1986 accident years" are included in "reserve strengthening." (R. Br. at 22 n.12.) What the Conference Report actually states is that "all additions to reserves *attributable to an increase in an estimate of a reserve* established for a prior [pre-1986] (continued...)

355-56. Certainly, the Conference Report's reference to Congress' intent to prevent taxpayers from "artificially" increasing their reserves suggests that Congress intended a limited definition of the term "reserve strengthening," rather than the broad definition espoused by respondent.[9] As discussed *infra* n.14, such legislative history cannot make a

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[8] (...continued)
accident year" constitute "reserve strengthening." H.R. Rep. No. 99-841, at II-367. Respondent never tries to explain why the Conference Committee would have added the limiting language that follows the words "all additions to reserves." As discussed in the brief amici curiae filed by a number of insurance trade associations, a fairer reading of the Conference Report language, taken as a whole, is that, if in reporting its loss reserve estimates for 1986 an insurer continued to use existing reserve assumptions and methodologies, there would be no increase *in a reserve estimate* and therefore no "reserve strengthening." (Brief *Amici Curiae* of American Insurance Association, et al. at 12 [hereinafter Tr. Assoc. Br. at ____].)

Separately, respondent states in his brief that "Section 1.846-3(c)(2) of the Treasury Regulations defines 'reserve strengthening' for the 1986 accident year in exact conformity with the definition contained in the Conference Committee Report and that aspect of the regulation is not challenged in this case." (R. Br. at 22 n.12.) Respondent did not adjust petitioner's loss reserves for the 1986 accident year, so section 1.846-3(c)(2) of the Treasury regulations of course could not be at issue in this case.

[9] Respondent embraces the definition of "artificial" cited by Judge Halpern in his dissent in *Western National*, 102 T.C. at 373. (R. Br. at 25 n.15.) Judge Halpern suggests that "[a] less common definition of the word 'artificial'" *i.e.*, "artful" or "cunning," was what "the conference committee had in mind." *Id.* With due respect to Judge Halpern, the definition of "artificial" that he proposes was not simply less common; it was obsolete. *Webster's Third New International Dictionary* 124 (1986); *Webster's Ninth New Collegiate Dictionary* 106 (1985). It is difficult to believe that Congress would have had an obsolete definition of "artificial" in mind when it used the term to describe the purpose of the "reserve strengthening" provision of the 1986 Act.

statutory term ambiguous when the language of the statute is itself unambiguous.

Respondent also points to a statement Senator Wallop made (several weeks after Congress voted on the 1986 Act), 1986 U.S.C.C.A.N. 4075; 132 Cong. Rec. 32,625 (Oct. 16, 1986), as evidence that the Conference Committee embraced a broad definition of "reserve strengthening" that is consistent with respondent's regulation. (R. Br. at 23.) In this connection, respondent conveniently ignores Senator Wallop's complaint at the beginning of his statement that he was troubled by the impact of "staff decisions" with respect to "issues never formally considered by the conferees." 132 Cong. Rec. 32,625 (October 16, 1986).

In any event, respondent's only support for considering the statement of Senator Wallop is a case which holds that statements of individual legislators are evidence of Congress' intent "when they are consistent with the statutory language and other legislative history" of a statutory provision. *Brock v. Pierce County*, 476 U.S. 253, 263 (1986). The authority cited by respondent also states that "[s]uch statements by individual legislators should not be given controlling effect . . . ." *Id.* Thus, an individual legislator's statement cannot properly be used to create ambiguity when the language of a statute is unambiguous. Moreover, Senator Wallop's statement is not clearly consistent with the other legislative history of the 1986 Act, because that legislative history is subject to more than one interpretation. *See supra* n.8. Accordingly, Senator Wallop's post-enactment statement should have no bearing on the Court's determination of the meaning of the term "reserve strengthening" as used in the 1986 Act.

6. *The regulation's unreasonable results.* In responding to illustrations of absurd and inequitable outcomes that the regulation produces, respondent contends, (R. Br. at 36-40), that "compensating adjustments" in IBNR or elsewhere in the insurer's reserve accounts should always operate to make the definition of "reserve strengthening" in the regulation reasonable.[10] However, despite respondent's arguments to the contrary, there are no automatic "compensating adjustments" to the unreasonable results under the regulation.[11]

Respondent first manufactures the concept of a "constructive reserve" in an effort to defend the reasonableness of the regulation. Respondent bases his constructive reserve analysis on a misreading of a factual stipulation concerning petitioner's method of accounting for loss payments. (Jt. App. at 37, Stip. ¶ 37.) Respondent reads that stipulation to say that "[a] payment of an amount in excess of the amount reserved would thus appropriately be accompanied by an increase in the case reserve for that

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[10] Respondent states that "[p]etitioner addresses only one example of what it deems to be an 'unreasonable' result." (R. Br. at 36.) There are other examples of unreasonable results, referred to in petitioner's brief (P. Br. at 47, 49), that the regulation produces that can be found in the report of Irene Bass, (Jt. App. at 79, 86), in the report of James MacGinnitie, (Jt. App. at 107-108), and in the trade association brief, (Tr. Assoc. Br. at 16-17). Respondent has chosen not to address the unreasonable results described in those sources.

[11] Respondent repeatedly refers to the absurd and inequitable results produced by his interpretation of the term "reserve strengthening" in the regulation as involving "hypothetical" applications of the regulation. (R. Br. at 35-40.) In this connection, it is to be noted that the trade association brief sets forth anomalous situations "frequently faced by member companies." (Tr. Assoc. Br. at 16-18.)

claim, with the reserve then being 'reduced to zero' by the payment." From that, respondent suggests that there was an implicit reserve increase whenever petitioner paid more for a claim in 1986 than it reserved for it in 1985.

The stipulation to which respondent refers does not say that petitioner ever increased a reserve in respect of a closed claim. It is clear from a proper reading of the stipulation that petitioner adjusted reserves only when it made partial claim payments on *open* claims. If a payment exceeded the case reserve being carried on a claim at the time the claim was closed, petitioner would charge such excess to *expense*, not to a "constructive" reserve that was simultaneously created and eliminated through offsetting entries. Respondent's concept of a "constructively strengthened" reserve is nonsense. The question therefore remains: How can a taxpayer be treated as having strengthened its year-end 1986 reserves for a claim which was fully paid in 1986 and for which no reserve could exist as of the end of 1986?

Respondent separately contends that petitioner's 1986 payments on a claim in excess of the 1985 reserve for the claim would not produce "reserve strengthening" under the regulation "if as the stipulation describes, the insurer estimates its 'IBNR reserves by estimating ultimate losses to be incurred for an accident year * * * then subtracting paid losses to date and case estimates of reported losses' (J.A. 31)." (R. Br. at 38.) Significantly, not all insureds follow the IBNR computation approach posited by respondent. Indeed, despite the contrary implication respondent creates in his brief through his selective quotation of the stipulation, (Jt. App. at 31, Stip. ¶ 20), the record in this case shows that *petitioner did not compute its IBNR in that manner*, (Jt. App. at 34-35, Stip. ¶ 30), and, therefore,

respondent's contention (which in any event is incorrect[12]) is irrelevant in this case.

7. *The inapplicable deference principle.* Respondent cites several cases for the proposition that courts must defer to respondent's interpretation of tax statutes. In light of this Court's decision in *Chevron U.S.A, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), deference to respondent's interpretation may be appropriate if the statutory language is ambiguous. But, as the Tax Court held in *Western National*, consistent with *Chevron*, "This case presents a different perspective because the statute is neither ambiguous nor imprecise." 102 T.C. at 360 n.25.

Respondent asserts that the meaning of the term "reserve strengthening" as used in the 1986 Act is not plain or unambiguous if resort must be had to other statutes and tax precedents to find meaning. Respondent cites *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) (*quoting K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-292 (1988)), for the proposition that plain meaning must be ascertained by looking to "'the particular statutory language at issue, as well

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[12] Respondent includes an incomprehensible example in his brief that appears to try to show that a 1986 claim payment in excess of the 1985 case reserve for the claim would necessarily result in a decrease in IBNR and therefore would prevent "reserve strengthening" from occurring under the regulation. Respondent arbitrarily (and incorrectly) assumes in his example that the insurer's estimate of ultimate incurred losses at the end of 1986 would be the same as it was at the end of 1985, despite the 1986 payment in excess of the case reserves. From this respondent draws the incorrect conclusion that "[i]t is only by ignoring IBNR that petitioner's hypotheticals yield the 'absurd' consequences of which it complains." (R. Br. at 39 n.26.) But, it is only by improperly ignoring the impact on an insurer's total loss estimate of a 1986 claim payment in excess of the 1985 case reserve for the claim that respondent's illustration can be shaped to avoid absurd results.

as the language and design of the statute as a whole.'" (R. Br. at 17-18.) Respondent suggests that if *any* resource (except possibly the dictionary) outside statutory language is utilized, the statute cannot have a plain meaning. (R. Br. at 19-20.)

While it is true that the 1986 Act does not provide a definition of "reserve strengthening," the plain meaning of a term can be supplied, for example, by repeated use of the term in insurance tax precedents in a consistent manner or by consistent prior use in a virtually identical statutory setting. It is simply incorrect to limit the boundaries of a plain meaning inquiry to what appears on the face of the statute without considering such prior usage. *See, e.g.*, *Commissioner v. Lundy*, 516 U.S. 235, __, 116 S. Ct. 647, 655 (1996); *Brown v. Gardner*, 513 U.S.115, __, 115 S. Ct. 552, 555 (1994); *Commissioner v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 159 (1993); *see also Pierce v. Underwood*, 487 U.S. 552, 568 (1988). Even in *Stroop*, the Supreme Court did not apply such an overly limited method of determining plain meaning. Instead, the Court looked for the commonly accepted definition of "child support" as used in domestic relations law, taking into account the definition provided in Black's Law Dictionary *and* the consistent definition of the term as used in other parts of the Social Security Act.[13] *Stroop*, 496 U.S. at 482, 484.

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[13] Respondent also relies on a statement made by the Supreme Court in *Greensport Basin & Construction Co. v. United States*, 260 U.S. 512, 516 (1923): "As the language of the act is clear, there is no room for the argument of plaintiff drawn from other revenue measures." In cases subsequent to *Greensport Basin*, the Supreme Court has clearly demonstrated that it can look to the use of a term in other statutes, as well as to the context of the statutory structure as a whole, to ascertain the plain meaning of a statutory term. *See, e.g.*, *Brown v. Gardner*, 513 U.S. at __ , 115 S.Ct. at 555 (1994), and other cases cited in petitioner's brief. (continued...)

Respondent's reliance on *TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978), for the general principle noted above, and *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985), also is misplaced. Those cases did *not* involve a statute that was plain and unambiguous.

Finally, respondent questions the applicability of the principle that when Congress uses the same term in the same or closely related statutes the term should be interpreted consistently. Respondent argues that the principle does not apply in this case because "Congress used different language in different contexts to address different subjects in these statutes." (R. Br. at 33.) As petitioner demonstrated in its opening brief, however, the term "reserve strengthening" was used in the 1984 Act and the 1986 Act in virtually identical provisions in virtually identical contexts to address virtually identical subjects.[14] (P. Br. at 20-25.)

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[13] (...continued)
(P. Br. 15.) Further, *Greensport Basin* is inapposite because that case did not involve the use of an identical term in separate statutes. Simply put, the quotation is clearly taken out of context and the government's reliance on it is misplaced.

[14] Respondent also suggests that the principle of consistent interpretation of statutory terms is merely a presumption which is overcome in this case by the Conference Report. (R. Br. at 33 n.23.) The authority cited by respondent is inapposite. It does not involve consistent interpretation of the same term in closely related statutes, but rather an attempt to import the meaning of a term as used in state statutes dealing with insurance into a federal statute dealing with banking, clearly not closely related statutes. *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995). Moreover, even if respondent were correct, the Conference Report in this case would not be sufficient to overcome the presumption. *Pierce v. Underwood*, 487 U.S. at 568. The intent of Congress with respect to the definition of "reserve strengthening" is not made clear by the Conference Report. As explained (continued...)

CONCLUSION

For the reasons set forth above and in petitioner's opening brief, the Court should reverse the judgment of the Court of Appeals for the Third Circuit and reinstate the judgment of the Tax Court.

Respectfully submitted,

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[14] (...continued)
in petitioner's opening brief, the language indicating that the Conference Committee was changing the *treatment* of "reserve strengthening," not making changes to the *definition* of the term, and the intent of Congress to prevent "artificial" reserve increases raise substantial questions about the meaning of the Conference Report. (P. Br. at 43-45; Tr. Assoc. Br. at 15-16.) Thus, the ambiguous Conference Report cannot overcome the unambiguous language of the statute.